

EXHIBIT F

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2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Adv. Case No. 08-01421-rdd, Lead Case No. 06-12226-rdd

5 - - - - -x

6 In the Matter of:

7 COUDERT BROTHERS, LLP,

8 Debtor.

9 - - - - -x

10 DEVELOPMENT SPECIALISTS, INC.,

11 Plaintiff,

12 -against-

13 WEISER REALTY ADVISORS LLC, ET AL.,

14 Defendants.

15 - - - - -x

16 U.S. Bankruptcy Court

17 One Bowling Green

18 New York, New York

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20 March 5, 2009

21 10:11 a.m.

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23 B E F O R E:

24 HON. ROBERT D. DRAIN

25 U.S. BANKRUPTCY JUDGE

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2 MOTION to Dismiss Adversary Proceeding 08-01421

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4 MOTION to Dismiss Adversary Proceeding 08-01418

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25 Transcribed by: Sharona Shapiro

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Development Specialists, Inc. v. Weiser Realty Advisors, LLC

1 complaint, which seeks to avoid as a fraudulent transfer the
2 debtor's entry into an amendment of its New York lease as of
3 September 23, 2005 which provided for, among other things, a
4 partial surrender of its premises to the landlord in the Grace
5 Building as well as a modification of rent going forward; a
6 return or termination of the debtor's interest in subleases
7 that went hand in hand with the surrender of space; certain
8 other modifications of the lease; a return of a portion of the
9 security deposit; and payments in connection with the entry by
10 Coudert into an agreement with Baker & McKenzie with respect to
11 the transfer of the fourth floor and the forty-second through
12 forty-fourth floors of the building (The payment resolved an
13 interest of the landlord in such payments under the original
14 lease and related disputes); and, finally, a modification of
15 the term of the remaining lease so that it would expire in 2008
16 -- on June 30, 2008 -- as opposed to in 2013.

17 The motion to dismiss contends that because the
18 debtor in possession assumed the lease as modified during the
19 course of its Chapter 11 case, that the plaintiff is now
20 estopped, primarily under a theory of judicial estoppel, from
21 avoiding the transfers pursuant to the lease modification that
22 I've just summarized.

23 The movant relied upon numerous cases that have
24 granted motions to dismiss preference actions after the
25 underlying contract, pursuant to which the preferential

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1 transfer was allegedly made, had been assumed. In addition,
2 the movant relied upon three cases in which that fact pattern
3 was extended from preference avoidance actions to actions to
4 avoid fraudulent transfers. See Official Committee of
5 Unsecured Creditors v. Aust, (In re Network Access Solutions
6 Corp.), 330 B.R. 67 (Bankr. D. Del. 2005); Vision Metals Inc.
7 v. SMS Demag, Inc. (In re Vision Metals Inc.), 325 B.R. 138,
8 141 (Bankr. D. Del. 2005), reh'g granted, 327 B.R. 719 (Bankr.
9 D. Del. 2005) (both of those decisions are by Judge Walrath), as
10 well as Schnelling v. Crawford (In re James River Coal Co.),
11 360 B.R. 139 (Bankr. E.D. Va. 2007).

12 Given the requirement under Section 365 to cure all
13 defaults, including pre-petition defaults, under an executory
14 contract before such contract can be assumed, the logic of the
15 preference cases relied upon by the landlord was crystal clear
16 to me. It was less clear to me that judicial estoppel, as a
17 result of assumption of an executory contract or lease, would
18 extend to the fraudulent transfer cause of action where the
19 contract or lease had been amended pre-petition and that
20 amendment was sought to be avoided as a fraudulent transfer.

21 That concern on my part was enhanced by the fact that
22 in each of the three cases that I have cited, all of which I
23 agree with completely, the parties had specifically agreed to a
24 release of claims or it was clear that such a release had been
25 contemplated at the time of the action in question, which might